



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

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HIV/AIDS IN THE WORKPLACE

EXECUTIVE SUMMARY

One of the most sensitive areas affected by HIV/AIDS is the workplace. The vast majority of those who are HIV-infected are in the economically productive age group between 20 and 49 years old. Many of these people are able and, indeed, anxious to continue working.

Misconceptions about HIV/AIDS and fear of contagion have resulted in discrimination against infected employees or persons **thought** to be infected. In the workplace, these individuals have been ostracized by colleagues, relegated to duties where they have no contact with other people, or fired altogether. This is most unfortunate, since normal workplace conditions do not provide an environment for HIV transmission. HIV **cannot** be transmitted by casual contact.

The *Freedom of Information and Protection of Privacy Act, 1987* (the *Act*) has definite implications for situations such as these. One of the purposes of the *Act* is to protect the privacy of individuals with respect to their personal information that is held by government. HIV/AIDS-related personal information is among the most sensitive personal information, and merits the utmost confidentiality and protection.

“HIV/AIDS in the Workplace” focuses on privacy issues related to HIV/AIDS, particularly the implications of the *Act* on the issue of HIV/AIDS-related personal information in the workplace.

The report contains 12 workplace privacy principles which ministries, agencies, boards and commissions of the Ontario Government are encouraged to incorporate into their general workplace policies on HIV/AIDS. Businesses in the private sector are also invited to make use of this information to assist in their development of workplace policies on HIV/AIDS.

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SUMMARY OF WORKPLACE PRIVACY PRINCIPLES

I. The *Freedom of Information and Protection of Privacy Act, 1987* does not provide grounds for the mandatory collection of HIV/AIDS-related personal information; nor does it require employees to provide such information as a condition of securing or continuing employment.

1. **Mandatory HIV antibody testing of prospective or current employees is not permitted.**
2. **Employees or persons seeking employment are under no obligation to disclose HIV/AIDS-related personal information to obtain or continue employment.**
3. **Employees have no right to acquire HIV/AIDS-related personal information about their co-workers. Employers have no right to disclose such information to an infected employee's co-workers.**

II. Since knowledge generally leads to greater understanding of any subject, employees need to learn the facts about HIV/AIDS: how the disease is transmitted; the possible consequences of improper collection, use and disclosure of HIV/AIDS-related personal information; and the protection provided by the *Act* for such personal information.

4. **Employers should educate employees about the nature of HIV/AIDS, the consequences of mishandling HIV/AIDS-related personal information for the affected person, and the obligations imposed by legislation, constitutional guarantees and general privacy principles about the handling of HIV/AIDS-related personal information.**

III. HIV/AIDS-related personal information that is volunteered by the infected person should generally not be retained. Anyone receiving HIV/AIDs-related personal information should use extreme caution in order to prevent disclosure to other workers. Any such information volunteered by a third party should be disregarded.

5. **Information volunteered by a person about him or herself should only be retained where it meets criteria similar to those that apply under subsection 38(2) of the *Act*, with respect to the collection of personal information. HIV/AIDS-related personal information should be retained only if at least one of the following three criteria is satisfied:**
 - i. retention is expressly authorized by statute
 - ii. retention is necessary for the purposes of law enforcement
 - iii. retention is necessary to the proper administration of a lawfully authorized activity.
6. **HIV/AIDS-related personal information that is volunteered about an employee by a third party should not be collected, used, disclosed or retained by an employer.**

IV. Collecting highly sensitive personal information imposes corresponding obligations to safeguard this information from improper or unnecessary use or disclosure. If HIV/AIDS-related personal information has been collected, it is imperative that strict security measures be taken to ensure its confidentiality.

7. **Employers who collect HIV/AIDS-related personal information should ensure that strict security precautions are taken to protect the information from accidental or unauthorized use or disclosure.**

V. Employers who are relying on HIV/AIDS-related personal information must remain aware of the limitations on the use of test results. Primarily, they must be wary of using negative test results that may be outdated. They must also remain aware of other deficiencies in findings of seropositivity and, particularly, seronegativity, that may make it risky to rely on certain test results to make decisions.

8. Employers should be aware of the risk that a person who has received a negative HIV antibody test may subsequently become seropositive, and that the statistical probability of this happening may increase over time. Employers should also be aware of other deficiencies inherent in both positive and negative antibody test results.

VI. Given the sensitive nature of HIV/AIDS-related personal information, it is vital that the person affected be permitted to gain access to his or her records containing such information, and challenge their accuracy if necessary. The *Act* permits only limited exceptions to this general rule.

9. Workplace policies should state that employees generally have a right of access to HIV/AIDS-related personal information under subsection 47(1) of the *Freedom of Information and Protection of Privacy Act, 1987*. These policies should also set out their rights under subsection 47(2) to request correction of the information, require the insertion of a statement of disagreement, and require other bodies to be notified of the correction or statement of disagreement.

VII. The *Act* requires that a number of restrictions must apply to the use of HIV/AIDS-related personal information.

10. Under section 41 of the *Freedom of Information and Protection of Privacy Act, 1987*, HIV/AIDS-related personal information may only be used in the following circumstances:

- where the person to whom the information relates has identified that information in particular and consented to its use
- for the purpose for which it was obtained or compiled
- for a purpose consistent with the purpose for which it was obtained or compiled
- for a purpose for which the information may be disclosed to the institution under section 42 of the *Act*.

Due to the extreme sensitivity of HIV/AIDS-related personal information, we recommend that the approval of the head of the institution (or his/her designate) be obtained in determining what constitutes a "consistent purpose" under section 41.

VIII. Just as the *Act* contains provisions which apply to the collection and retention of HIV/AIDS-related personal information, it also addresses the disclosure of HIV/AIDS-related personal information. Employers must not disclose such information, except in accordance with section 42 of the *Act*.

11. Employers must not disclose HIV/AIDS-related personal information, except in accordance with section 42 of the *Freedom of Information and Protection of Privacy Act, 1987*. In some cases, the disclosure provisions of section 42 should be supplemented to require the consent of the affected person, or where the person does not or cannot consent, the approval of the head (or his/her designate) of the affected institution.

12. When deciding whether to approve disclosure, the head of an institution (or his/her designate) should consider the following:

- why disclosure is necessary
- the potential adverse consequences for the person to whom the information relates
- the likelihood that the requester of the information will maintain its confidentiality
- the likelihood that the requester will use it only for the purpose for which it is being sought
- how accurate and up to date the information is.

